



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS GRANTED: May 19, 2009

CBCA 1002

CORNERS AND EDGES, INC.,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

John E. Larson of Corners and Edges, Inc., Hamilton, MT, appearing for Appellant.

Daniel J. Barry and Mogbeyi E. Omatete, Office of General Counsel, Department of Health and Human Services, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **McCANN**, and **DRUMMOND**.

BORWICK, Board Judge.

The Department of Health and Human Services, respondent or DHHS, moves to dismiss this appeal on the grounds of res judicata, maintaining that the Armed Services Board of Contract Appeals (ASBCA) decision in ASBCA 55767 decided the same claim as the claim involved in this appeal. For the reasons below, we grant respondent's motion and dismiss this appeal.

Background

The ASBCA appeal

The ASBCA appeal involved contract number 263-99-C-7278 (NO2-AO-972278) (the janitorial contract) for janitorial services at respondent's Rocky Mountain Laboratory (RML). *Corners and Edges, Inc.*, ASBCA 55767, 09-1 BCA ¶ 34,019, at 168,291. On October 1, 1998, respondent awarded the contract to appellant to provide at the RML, complete janitorial services, which included all necessary labor, supervision, and services. *Id.* at 168,292. (Finding 1).¹ The contract term of one year was eventually extended by exercise of options through March 2004. *Id.* (Finding 2). Although the contract provided estimates of the square footage of floor space to be cleaned, it warned that RML was undergoing significant renovation. Consequently, the amount of space to be cleaned could vary as facilities were removed from and returned to usage. *Id.* (Finding 3). The contract did not fix or guarantee the number of researchers or scientists that would be using the space to be serviced by appellant or their furnishings or professional equipment. *Id.*

The contract required appellant to empty trash from trashcans at RML offices on a daily basis, collect all of the trash, and bring it to the incinerator. Appellant was able to collect the trash and place it in the incinerator without bagging it. *Corners and Edges, Inc.*, 09-1 BCA at 168,293. (Finding 5). On January 6, 2000, the RML incinerator was taken out of service for repairs. *Id.* (Finding 6). Consequently, the contract project officer directed appellant to bag trash. On February 2002, the successor project officer directed appellant to dust unobstructed horizontal surfaces in office areas. *Id.* (Finding 7). A series of letters resulted in what appellant called a "changed conditions" claim of \$13,244.56 arising from the project officer's directives. *Id.* (Finding 9). The changed conditions claim also arose from an alleged increase in the number of biologists and researchers and their staffs. *Id.* Over the next several years, appellant submitted additional claim letters revising amounts due for the alleged changed conditions. *Id.* at 168,294. (Finding 11).

Appellant submitted an amended certified claim on October 4, 2006, seeking \$194,076, and requested a contracting officer's decision. *Corners and Edges, Inc.*, 09-1 BCA ¶ 34,019, at 168,294 (Finding 11). On January 4, 2007, appellant filed an appeal with the ASBCA from a "deemed denial" of that decision, which was docketed as ASBCA 55767. *Id.*

¹ We reference the numbered findings in the ASBCA opinion.

The parties in the ASBCA appeal agreed to submit their dispute on the record pursuant to ASBCA Rule 11. The board denied entitlement for that portion of the claim dealing with trash bagging and dusting, holding that the project officer's directives as to those activities were unauthorized and not ratified by the contracting officer. Consequently, appellant could not recover for any alleged changes associated with those directives. *Corners and Edges, Inc.*, 09-1 BCA at 168,294. As to the changes claim based upon increase in staff, the board denied entitlement because appellant did not demonstrate job conditions encountered that differed materially from those identified in the contract. The board held that the contract did not guarantee a particular staffing level at the RML; to the contrary, the contract required appellant to provide all necessary labor for complete janitorial services. *Id.*

As appellant did not submit seek reconsideration or appeal the ASBCA decision, the ASBCA decision has become final, the reconsideration and appeal periods having long passed.

The CBCA appeal

On November 8, 2007, while the ASBCA appeal was pending on a deemed denial of appellant's October 4, 2006, claim on the janitorial contract, the contracting officer issued a decision on that claim. Appeal File, Exhibit 1. Appellant submitted a notice of appeal from that decision to this Board on December 21, 2007, and the appeal was docketed on January 4, 2008.

The contracting officer's decision was issued well after the creation of the Civilian Board of Contract Appeals (CBCA), effective January 6, 2007. After that date, Contract Disputes Act (CDA) appeals from decisions of DHHS contracting officers go to this Board. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 847, 119 Stat. 3136. Appellant submitted a timely appeal to this Board from that decision.²

In short, appellant submitted its appeal based upon the deemed denial of the claim to the ASBCA two days before the statutory creation date of the CBCA, and it submitted its CBCA appeal from the contracting officer's decision on the same claim, involving the same contract, well after the creation date of the CBCA. The National Defense

² Additionally, appellant filed an appeal from that decision at the ASBCA, where it was docketed as ASBCA 56277. The ASBCA dismissed that appeal for lack of jurisdiction. *Corners and Edges, Inc.*, ASBCA 55767, 56277, 08-2 BCA ¶ 33,949.

Authorization Act provision creating the CBCA made no provision for transfer of then-pending appeals of DHHS's contract disputes from the ASBCA to the CBCA.

The parties requested a suspension of proceedings in this appeal pending a decision from the ASBCA in ASBCA 55767. This Board stayed proceedings until April 10, 2009, or the date the ASBCA issued its decision, whichever date was earlier. The ASBCA issued its decision on November 24, 2008. Respondent submitted a motion to dismiss on the basis of res judicata. Appellant opposes the motion.

Discussion

When a final judgment has been entered on the merits of a case, it is final as to the claim or demand in controversy. This is true not only as to every matter which was offered and received, but also as to any other matter which might have been offered for that purpose. *Nevada v. United States*, 463 U.S. 110, 129-30 (1983). The doctrine of res judicata will bar a second suit raising claims based on the same set of transactional facts. *Ammex, Inc. v. United States*, 334 F.3d 1052, 1055 (Fed. Cir. 2003). The doctrine of res judicata applies to the final judgment of an administrative tribunal, such as a board of contract appeals that resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate. *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). *See also Philips/May Corp. v. United States*, 524 F. 3d 1264, 1272 (Fed. Cir. 2008) (res judicata applies to inspection claim suit filed in United States Court of Federal Claims after a CDA dispute had been decided by the ASBCA on the same set of operative facts; the contractor could not split claims between the two fora).

For a party to prevail on a defense of res judicata, the party asserting the bar must prove that: (1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of transactional facts as the first. *Ammex*, 334 F.3d at 1055. Courts have defined "transaction" in terms of a "core of operative facts," the "same operative facts," or the "same nucleus of operative facts," and "based on the same, or nearly the same, factual allegations." *Id.* at 1056.

In this matter, all the elements of res judicata are met. Since both appeals involve the DHHS and appellant, the parties are identical. The ASBCA appeal is final, since no appeal was taken. 41 U.S.C. § 607(g) (2006). Finally, the appeal before this Board arose from the same set of transactional facts in the claim of October 4, 2006, on the janitorial contract, that was before the ASBCA. The claim now pending before this Board is identical to the claim considered by the ASBCA, and the decision of the ASBCA resolved all issues of entitlement against claimant and in favor of respondent. Appellant has not

demonstrated that there is anything remaining to litigate in this forum that was not disposed of by the ASBCA proceeding.

Appellant's arguments resisting respondent's motion are not persuasive. Although appellant admits that the two appeals "shared issues in common, it argues that application of the res judicata doctrine is not appropriate because the ASBCA decided the appeal "without formal consideration of the Contracting Officer's Final Decision" on the claims submitted by appellant. Appellant's Opposition at 3. Consequently, appellant characterizes the ASBCA decision as resolving "a fictional dispute." *Id.* This argument lacks merit. The facts and the claims were identical in both appeals. Furthermore, the contracting officer's opinion was certainly available in that appeal if appellant desired to find it out.³

Decision

Respondent's motion to dismiss is **GRANTED**. This matter is dismissed on the basis that it is res judicata.

ANTHONY S. BORWICK
Board Judge

R. ANTHONY McCANN
Board Judge

JEROME M. DRUMMOND
Board Judge

³ Indeed, the CDA authorizes the filing of a CDA claim on a deemed denial basis, and appellant could have requested the ASBCA to stay its proceeding until the contracting officer issued a decision. 41 U.S.C. § 605(c)(5) (2006). Alternatively, appellant had the option of filing a petition under 41 U.S.C. § 604 to obtain the contracting officer's decision before proceeding with an appeal. Additionally, appellant could have taken the deposition of the contracting officer in the ASBCA proceeding and requested a hearing in the ASBCA proceeding where it could have called the contracting officer as a witness.

